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FAIZOULL AHMAD v. PP & OTHER APPEALS

HIGH COURT MALAYA, KUALA LUMPUR
AHMAD SHAHRIR MOHD SALLEH J
[CRIMINAL APPEAL NOS: WA-42R-7-06-2018,
WA-42R-8-06-2018 & WA-42R-9-06-2018]
16 MARCH 2025

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Abstract – *The elements of abetment under s. 109, read together with s. 107 of the Penal Code ('PC'), are legally distinct from the elements of the principal offence under s. 409 of the PC. The criminal act attributed to an accused charged with the offence of abetment need not necessarily be identical to the act constituting the principal offence. The failure to make separate findings on the elements of abetment, as occasioned in the case at hand, resulted in a misdirection in law and a miscarriage of justice. By not delineating which specific acts of abetment an accused was found to have committed, the accused is deprived of his right to a fair trial.*

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CRIMINAL LAW: *Abetment – Criminal breach of trust – Authorisation of investments without necessary approval from Board of Directors – Criminal act attributed to accused charged with offence of abetment identical to act constituting principal offence – Whether there was failure by trial judge to make distinct findings regarding elements of abetment – Whether there was flawed approach by trial judge resulting in misdirection in law and miscarriage of justice – Whether accused deprived of opportunity to adequately address allegations during defence – Penal Code, ss. 107, 109 & 409*

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Faizoull Ahmad ('Faizoull') and the late Muhammad Sufi ('Sufi'), were the Director-General and Deputy Director-General (Strategic Resources), respectively, of FELDA. In 2013, FELDA's Board of Directors ('FELDA's BOD') granted approval for the establishment of FELDA Investment Corporation Sdn Bhd ('FIC'), as a special purpose vehicle to undertake strategic investments. FELDA's BOD delegated authority to FIC's Board of Directors to independently approve investments valued at RM100 million and below. Investments exceeding this threshold, however, required prior approval from FELDA's BOD. FELDA's management explored alternative revenue streams to sustain the organisation's annual operational costs which amounted to approximately RM600 million. FELDA's BOD granted approval for a joint venture project ('Sturgeon Project'), following which, several subsidiary companies were incorporated to facilitate the implementation of the said project. These included Capital Protocol Sdn Bhd (later renamed FELDA Investment Corporation Sdn Bhd), FELDA Korea Malaysia Sdn Bhd and FELDA Caviartive Sdn Bhd ('FCSB'), where Faizoull and Sufi held positions as directors. Between January and July 2014, substantial payments were executed through FCSB. Faizoull was said to have

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abetted Sufi in the commission of a criminal breach of trust by authorising the investments without the necessary approval from FELDA's BOD. At the Sessions Court, (i) Faizoull was charged with two offences of abetment, pursuant to s. 109 of the Penal Code ('PC'); while (ii) Sufi was charged with two offences of criminal breach of trust, pursuant to s. 409 of the PC. The charges were heard together. At the conclusion of the trial, Faizoull was sentenced to two years' imprisonment for each charge; while Sufi was sentenced to five years' imprisonment for each charge. The sentences were ordered to run concurrently. Hence, the present appeals by Faizoull and Sufi against the conviction and sentence. The prosecution, on the other hand, cross appealed against the sentences. Sufi passed on during the hearing of the appeal and, subsequently, his appeal was withdrawn; the prosecution's cross appeal against him was also withdrawn. The appeal by Faizoull and the cross appeal by prosecution against him remained.

Held (allowing appeal; dismissing cross appeal):

(1) Under s. 107 of the PC, the criminal act attributed to an accused charged with the offence of abetment need not necessarily be identical to the act constituting the principal offence. The crucial requirement is the existence of a causal connection between the act of abetment and the commission of the principal offence. To secure a conviction under s. 109 read together with s. 409 of the PC, the prosecution bore the burden of proving, beyond reasonable doubt, that: (i) the principal offence of criminal breach of trust, under s. 409, was committed by Sufi; (ii) Faizoull either instigated, commanded, conspired with or intentionally aided Sufi in the commission of the principal offence; and (iii) the principal offence was committed as a direct consequence of Faizoull's act of abetment. (paras 23 & 24)

(2) The trial judge failed to make distinct findings regarding the elements of abetment against Faizoull. He had erroneously proceeded on the premise that both Sufi and Faizoull were charged with the same offence of criminal breach of trust under s. 409 of the PC. This flawed approach resulted in a misdirection in law which deprived Faizoull the opportunity to adequately address the precise allegations against him during his defence. The lack of specificity in the findings further hindered Faizoull's ability to challenge the prosecution's case effectively. (paras 25 & 28)

(3) The trial judge failed to conduct a proper evaluation of the defence evidence. He summarily dismissed much of the defence's case as 'bare denial' without providing a reasoned analysis of its merits. This approach contravened established legal principles regarding the assessment of evidence. (para 35)

(4) A fundamental weakness in the prosecution's case was its failure to produce critical evidence relating to FELDA's BOD meetings. The prosecution's failure to produce the audio recordings, which would have definitely clarified the discussions and decisions made during FELDA's BOD meetings, constituted a severe evidentiary gap. An adverse inference ought to be drawn against the prosecution. The absence of the recordings supported Faizoull's contention that FELDA's BOD had, in fact, granted approval for the sturgeon project. The deleted recordings could have confirmed whether FELDA's BOD had imposed conditions on the project or granted it unqualified approval. (paras 65 & 71)

(5) The prosecution failed to establish its case beyond reasonable doubt. Faizoull's appeal against the conviction and sentence were allowed; the conviction and sentence imposed by the Sessions Court were set aside. Faizoull was accordingly acquitted and discharged of both charges. (para 96)

Case(s) referred to:

Aisyah Mohd Rose & Anor v. PP [2016] 1 CLJ 529 CA ***(refd)***
Alcontara Ambross Anthony v. PP [1996] 1 CLJ 705 FC ***(refd)***
Chang Lee Swee v. PP [1984] CLJU 134; [1984] 1 LNS 134 HC ***(refd)***
Dato' Yap Peng v. PP [1993] 2 CLJ 181 HC ***(refd)***
Datuk Tiah Thee Kian v. PP & Other Appeals [2002] 2 CLJ 21 HC ***(refd)***
Faguna Kanta Nath v. State of Assam AIR 1959 SC 673 ***(refd)***
Mohd Zulhialmi Md Darns v. PP & Other Appeals [2022] CLJU 2173 [2022] 1 LNS 2173 CA ***(dist)***
Ooi Juan Seng v. PP [2009] CLJU 1750; [2009] 1 LNS 1750 HC ***(refd)***
Periasamy Sinnappan v. PP [1996] 3 CLJ 187 CA ***(refd)***
PP v. Datuk Hj Harun Hj Idris & Ors [1977] CLJU 92; [1977] 1 LNS 92 HC ***(refd)***
PP v. Hj Hussin Hj Mohd Rejab [1994] 3 CLJ 93 HC ***(refd)***
PP v. Mohd Azam Basiron & Anor [2010] 9 CLJ 1 CA ***(refd)***
Ravindran Ramasamy v. PP [2015] 3 CLJ 421 FC ***(refd)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(dist)***

Legislation referred to:

Criminal Procedure Code, ss. 156, 422
Evidence Act 1950, s. 114(g)
Penal Code, ss. 107(aa), (b), 109, 409

For the appellant - Fadhli Sutris, Sulaiman Ismail & Nurul Hidayah; M/s Fadhli Sutris & Assocs

For the respondent - Ahmad Feisal Mohd Azmi; FC, Malaysian Anti-Corruption Commission

[Editor's note: Appeal from Sessions Court; Arrest Case No: WA-62R-005-03-2017 & WA-62R-006-03-2017.]

Reported by Najib Tamby

JUDGMENT

Ahmad Shahrir Mohd Salleh J:

Introduction

[1] At trial, the appellant in this appeal was charged with two offences of abetment under s. 109 of the Penal Code. Another person, Muhammad Sufi bin Mahbub ('Muhammad Sufi'), was charged with two offences of criminal breach of trust under s. 409 of the Penal Code.

[2] The charges for abetment against the appellant were in respect of the offences of criminal breach of trust committed by Muhammad Sufi. The charges against both the appellant and Muhammad Sufi were tried together.

[3] At the close of prosecution, both Muhammad Sufi and the appellant were called to enter their defence. When the case for the defence concluded, both Muhammad Sufi and the appellant were found guilty and convicted.

[4] For each charge under s. 409 of the Penal Code, Muhammad Sufi was sentenced to imprisonment for the period of five years. The sentence of imprisonment was ordered to run concurrently. The appellant was sentenced to imprisonment for the period of two years for the offence of abetment. The sentence too was ordered to run concurrently.

[5] Both Muhammad Sufi and the appellant were not satisfied and respectively appealed against conviction and sentence. The Public Prosecutor was not satisfied with the sentence imposed by the trial court and cross-appealed against sentence.

[6] During hearing of the appeal, Muhammad Sufi passed on. Subsequently, his appeal was withdrawn. At the same time, the Public Prosecutor's cross-appeal for sentence against Muhammad Sufi was also withdrawn. Both the appeal and cross-appeal in respect of Muhammad Sufi were accordingly struck out.

[7] The appeal by the appellant and cross-appeal by the Public Prosecutor remained. At the conclusion of the appeal, I allowed the appellant's appeal and set aside the conviction and sentence handed down by the trial court for each charge. Consequently, the appellant was acquitted and discharged of the two charges. Effectively, the Public Prosecutor's cross-appeal was also dismissed. The Public Prosecutor was not satisfied and appealed.

The Charges

[8] Muhammad Sufi faced two charges for criminal breach of trust under s. 409 of the Penal Code. One was allegedly committed between January and July 2014 and the other between March and July 2014.

[9] The two charges against Muhammad Sufi were registered as Arrest Case No. WA-62R-006-03-2017. The respective charges in their original language were as follows:

(i) Charges against Muhammad Sufi

Arrest Case No. WA-62R-006-03-2017

First charge:

> Bahawa kamu, di antara 13.01.2014 hingga 23.07.2014 di
>
> Bangunan Wisma Lembaga Kemajuan Tanah Persekutuan (FELDA), Jalan Perumahan Gurney, dalam Wilayah Persekutuan Kuala Lumpur, sebagai ejen, iaitu Timbalan Pengarah Besar Sumber Strategik FELDA dan di dalam kapasiti tersebut diamanahkan dengan penguasaan ke atas dana FELDA, telah melakukan pecah amanah jenayah ke atas dana tersebut, di mana kamu telah dengan curangnya melupuskan wang tersebut dengan memasuki Perjanjian "Technology Transfer and Supply Agreement (TTSA)" dengan I2C Hassed Co. Ltd (No. Syarikat: 110111 - 4680199) melalui FELDA Caviartive Sdn Bhd (No. Syarikat: 1076691-K) dan meluluskan pembayaran berjumlah RM25,999,000.00 tanpa kelulusan Lembaga Pengarah FELDA. Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 409 Kanun Keseksaan [Akta 574] dan boleh dihukum di bawah seksyen yang sama.

Second charge:

> Bahawa kamu, di antara 31.3.2014 hingga 23.07.2014 di Bangunan Wisma Lembaga Kemajuan Tanah Persekutuan (FELDA), Jalan Perumahan Gurney, dalam Wilayah Persekutuan Kuala Lumpur, sebagai ejen, iaitu Timbalan Pengarah Besar Sumber Strategik FELDA dan di dalam kapasiti tersebut diamanahkan dengan penguasaan ke atas dana FELDA, telah melakukan pecah amanah jenayah ke atas dana tersebut, di mana kamu dengan curangnya melupuskan wang tersebut dengan memasuki Perjanjian "Design-Build Contract Agreement (DBCA)" dengan I2C Hassed Co. Ltd (No. Syarikat: 1061918-U) melalui FELDA Caviartive Sdn Bhd (No. Syarikat: 1076691-K) dan meluluskan pembayaran berjumlah RM21,626,500.00 tanpa kelulusan Lembaga Pengarah FELDA. Oleh yang demikian, kamu telah melakukan kesalahan di bawah seksyen 409 Kanun Keseksaan [Akta 574] dan boleh dihukum di bawah seksyen yang sama.

[10] The appellant faced two charges for abetment under s. 109 of the Penal Code. The first charge was alleged to have been committed between January and July 2014. This was in relation to the first charge proffered against Muhammad Sufi. The second charge was allegedly committed between March and July 2014. This was in relation to the second charge proffered against Muhammad Sufi.

[11] The two charges against the appellant were registered as Arrest Case No. WA-62R-005-03/2017. The respective charges in their original language were as follows:

(ii) Charges against the appellant

Arrest Case No. WA-62R-005-03/2017

First charge:

> Bahawa kamu, di antara 13.01.2014 hingga 23.07.2014 di
>
> Bangunan Wisma Lembaga Kemajuan Tanah Persekutuan (FELDA), Jalan Perumahan Gurney, dalam Wilayah Persekutuan Kuala Lumpur, telah bersubahat dengan Muhammad Sufi bin Mahbub (No. K/P: 640724 - 01 - 5941) untuk melakukan pecah amanah jenayah berkenaan dengan dana FELDA berjumlah RM25,999,000.00 di mana Muhammad Sufi telah diamanahkan dengan penguasaan ke atas dana tersebut dalam menjalankan tugasnya sebagai Timbalan Pengarah Besar Sumber Strategik FELDA, di mana kesalahan pecah amanah jenayah tersebut dilakukan atas sebab-sebab persubahatan kamu dan oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 109 Kanun Keseksaan [Akta 574] yang dibaca bersama seksyen 409 Kanun yang sama.

Second charge:

> Bahawa kamu, di antara 31.03.2014 hingga 23.07.2014 di Bangunan Wisma Lembaga Kemajuan Tanah Persekutuan (FELDA), Jalan Perumahan Gurney, dalam Wilayah Persekutuan Kuala Lumpur, telah bersubahat dengan Muhammad Sufi bin Mahbub (No. K/P: 640724-01-5941) untuk melakukan pecah amanah jenayah berkenaan dengan dana FELDA berjumlah RM21,626,500.00 di mana Muhammad Sufi telah diamanahkan dengan penguasaan ke atas dana tersebut dalam menjalankan tugasnya sebagai Timbalan Pengarah Besar Sumber Strategik FELDA, di mana kesalahan pecah amanah jenayah tersebut dilakukan atas sebab-sebab persubahatan kamu dan oleh yang demikian kamu telah melakukan kesalahan yang boleh dihukum di bawah seksyen 109 Kanun Keseksaan [Akta 574] yang dibaca bersama seksyen 409 Kanun yang sama.

Brief Background Of Facts

[12] The appellant, Faizoull bin Ahmad, was appointed as the Director-General of FELDA in 2012. He remained in this position until his transfer to the Prime Minister's Department in December 2014. During his tenure, Muhammad Sufi bin Mahbub served as the Deputy Director-General (Strategic Resources) and reported directly to the appellant.

[13] Sometime in March 2013, FELDA's Board of Directors granted approval for the establishment of FELDA Investment Corporation Sdn Bhd ('FIC'). This entity was created as a special purpose vehicle to undertake strategic investments. The Board allocated an initial paid-up capital of RM500 million for FIC. The Board also delegated authority to FIC's Board

of Directors to independently approve investments valued at RM100 million and below. However, any investment exceeding this threshold required prior approval from FELDA's Board of Directors.

[14] Following the listing of FELDA Global Ventures ('FGV') on the stock exchange in 2012, FELDA lost its primary source of revenue. This was due to the leasing of FELDA's plantation lands to FGV for a period of 99 years. Consequently, FELDA's management, including the appellant, explored alternative revenue streams to sustain the organisation's annual operational costs which amounted to approximately RM600 million.

[15] In response to suggestions from the Prime Minister regarding Malaysia's entry into the global sturgeon caviar market, on 4 July 2013 FELDA's Board of Directors granted in-principle approval for a joint venture project, referred to as the "Sturgeon Project". This project was proposed in collaboration with a Korean company, MMC Hassed Co Ltd The approval for this venture was formally recorded in FELDA Board Minutes No. 304 (Special) during a special board meeting.

[16] Several subsidiary companies were incorporated to facilitate the implementation of the Sturgeon Project. These included Capital Protocol Sdn Bhd (later renamed FELDA Investment Corporation Sdn Bhd), FELDA Korea Malaysia Sdn Bhd and FELDA Caviartive Sdn Bhd. Both the appellant and Muhammad Sufi held positions as directors in these subsidiary companies.

[17] Between 13 January 2014 and 23 July 2014, two substantial payments were executed through FELDA Caviartive Sdn Bhd. The first payment, amounting to RM25,999,000 was made pursuant to a technology transfer and supply agreement ('TTSA'). The second payment, amounting to RM21,626,500 was made under a Design-Build Contract Agreement ('DBCA'). These agreements were entered into with I2C Hassed (M) Sdn Bhd through FELDA Caviartive Sdn Bhd.

[18] The prosecution contended that these payments were made without obtaining the requisite approval from FELDA's Board of Directors. The Board had expressly required that a comprehensive investment study be conducted and submitted for approval before the implementation of the Sturgeon Project. The prosecution alleged that no such study was ever undertaken or presented for approval.

[19] In March 2017, the appellant was charged with two counts of abetment of the offence of criminal breach of trust under s. 109 read together with s. 409 of the Penal Code. The prosecution alleged that the appellant had abetted Muhammad Sufi in the commission of criminal breach of trust by authorising the investments without the necessary approval from FELDA's Board of Directors.

[20] The appellant and Muhammad Sufi were jointly tried before the Sessions Court. At the conclusion of the trial, both were convicted. Muhammad Sufi was sentenced to five years' imprisonment for each charge with the sentences to run concurrently. The appellant was sentenced to two years' imprisonment for each charge of abetment, also to run concurrently.

[21] Both the appellant and Muhammad Sufi appealed against their convictions and sentences. The Public Prosecutor, in turn, filed a cross-appeal seeking an enhancement of the sentences imposed by the trial court. During the pendency of the appeals, Muhammad Sufi passed away. Consequently, his appeal, as well as the Public Prosecutor's cross-appeal against him, was withdrawn.

Analysis And Findings

Ingredients Of Abetment

[22] Before delving into the specific issues of this appeal, it is essential to examine the ingredients of the offence of abetment. Section 107 of the Penal Code defines abetment as follows:

> Abetment of a thing
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> 107. A person abets the doing of a thing who:
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> (a) instigates any person to do that thing;
>
> (aa) commands any person to do that thing;
>
> (b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or
>
> (c) intentionally aids, by any act or illegal omission, the doing of that thing.

[23] It is pertinent to observe that under s. 107 of the Penal Code, the criminal act attributed to an accused charged with the offence of abetment need not necessarily be identical to the act constituting the principal offence. The crucial requirement is the existence of a causal connection between the act of abetment and the commission of the principal offence.

[24] Therefore, to secure a conviction under s. 109 read together with s. 409 of the Penal Code in the present appeal, the prosecution bore the burden of proving, beyond reasonable doubt, the following essential elements:

(i) that the principal offence of criminal breach of trust under s. 409 of the Penal Code was committed by Muhammad Sufi;

(ii) that the appellant either instigated, commanded, conspired with, or intentionally aided Muhammad Sufi in the commission of the principal offence; and

(iii) that the principal offence was committed as a direct consequence of the appellant's act of abetment.

Failure Of The Trial Judge To Make Distinct Findings On Abetment

[25] With respect, a critical and fundamental error in the trial judge's approach was his failure to make distinct findings regarding the elements of abetment against the appellant. A careful reading of the trial judge's grounds of judgment reveals that he erroneously proceeded on the premise that both Muhammad Sufi and the appellant were charged with the same offence of criminal breach of trust under s. 409 of the Penal Code. This flawed approach resulted in a misdirection in law.

[26] In his analysis, the trial judge assessed the evidence in respect of the charges against the appellant together with his analysis of the charges against Muhammad Sufi, as if both were charged with the same principal offence. This approach fundamentally misapprehended the nature of the charges against the appellant which were for abetment under s. 109 of the Penal Code, not for the principal offence under s. 409.

[27] In *Ooi Juan Seng v. PP* [2009] CLJU 1750; [2009] 1 LNS 1750; [2009] 8 MLRH 335; [2011] 7 MLJ 409; [2009] AMEJ 0002; His Lordship the Honourable Abang Iskandar Abang Hashim JC (now PCA) emphasised that while the prosecution is not required to specify in the charge which particular limb of s. 107 of the Penal Code is being relied upon, the trial court must make a clear and specific finding at the end of the prosecution's case based on the evidence presented at that stage.

[28] The trial judge's failure to make distinct findings on the specific mode of abetment, whether by instigation, command, conspiracy, or intentional aid, constituted a serious misdirection. This misdirection deprived the appellant of the opportunity to adequately address the precise allegations against him during his defence. The lack of specificity in the findings further hindered the appellant's ability to challenge the prosecution's case effectively.

[29] In *Mohd Zulhialmi Md Darns v. PP & Other Appeals* [2022] CLJU 2173 [2022] 1 LNS 2173; [2023] 1 MLJ 833; [2022] 8 AMR 229; [2022] AMEJ 1472; [2022] MLRAU 212; His Lordship, the Honourable Nordin Hassan JCA (now FCJ), observed as follows:

> [77] Having reviewed the evidence before the court, we find that there is overwhelming evidence that the 1st and 2nd accused abetted the commission of the murder by the 3rd accused although the trial judge had not addressed the issue of abetment by the 1st and 2nd accused. Here, the prosecution had proved the charge of abetment against the 1st and 2nd accused.

[30] In *Mohd Zulhialmi* (*supra*), despite the trial judge's failure to explicitly address the issue of abetment, the Court of Appeal found that the evidence overwhelmingly proved the offence. However, the present appeal is very

much distinguishable from *Mohd Zulhialmi* (*supra*). In the present appeal, the trial judge not only failed to make specific findings on abetment but also conflated the analysis of the appellant's case with that of Muhammad Sufi. By treating both as if they were charged with the same offence, the trial judge fundamentally misconceived the legal principles applicable to abetment.

[31] This erroneous approach was deeply flawed. The elements of abetment under s. 109 read with s. 107 of the Penal Code are legally distinct from the elements of the principal offence under s. 409. The failure to make separate findings on the elements of abetment resulted in a miscarriage of justice. By not delineating which specific acts of abetment the appellant was found to have committed, the trial judge deprived the appellant of his right to a fair trial. This omission created uncertainty in the findings and undermined the appellant's ability to present a proper defence.

Misdirection In The Trial Judge's Approach

[32] A thorough examination of the trial judge's grounds of judgment reveals multiple serious misdirections that necessitate appellate intervention. These misdirection are not minor irregularities but instead go to the very core of the case, affecting the fairness of the proceedings and the validity of the conviction.

[33] First, as previously highlighted, the trial judge erroneously treated the appellant and Muhammad Sufi as though they were charged with the same offence of criminal breach of trust under s. 409 of the Penal Code. This fundamental misunderstanding permeated the entire judgment. The trial judge failed to distinguish between the elements required to establish the principal offence and those necessary to prove abetment. As a result, he erroneously applied the same legal analysis to both accused, thereby distorting the proper legal basis applicable to the appellant's charges.

[34] Second, the trial judge failed to determine which specific mode of abetment under s. 107 of the Penal Code was supported by the evidence, whether it was by instigation, command, conspiracy, or intentional aid. Each mode of abetment contains distinct legal elements that must be established beyond reasonable doubt. The failure to make such a determination constituted a serious misdirection as it deprived the appellant of the opportunity to effectively address the allegations against him and mount a proper defence.

[35] Third, the trial judge failed to conduct a proper evaluation of the defence evidence. He summarily dismissed much of the defence's case as "bare denial" without providing a reasoned analysis of its merits. This approach contravened established legal principles regarding the assessment of evidence. In *Dato' Yap Peng v. PP* [1993] 2 CLJ 181; [1993] 1 MLJ 337; [1993] 1 MLRH 285; [2021] MLRHU 2511, the court remarked that evidence provided by independent witnesses who have no personal interest

in the case must be carefully and impartially considered. The trial judge's failure to properly assess the defence evidence further compromised the fairness of the trial.

[36] In *Alcontara Ambross Anthony v. PP* [1996] 1 CLJ 705; [1996] 1 MLRA 47; [1996] 1 MLJ 209; [1996] 1 AMR 817; [2023] MLRHU 1442, the Federal Court laid down the general rule that an appellate court should quash a conviction where a misdirection has occurred.

[37] The misdirection in the present case are so fundamental that they cannot be cured by invoking s. 422 of the Criminal Procedure Code. Section 422 of the Criminal Procedure Code empowers an appellate court to uphold a conviction despite the presence of errors, omissions, irregularities, *etc*, if the court is satisfied that no substantial miscarriage of justice has occurred. However, in the present appeal I found the errors committed by the learned trial judge were so severe that they vitiated the entire proceedings rendering the conviction unsafe.

[38] In *Tunde Apatira & Ors v. PP* [2001] 1 CLJ 381; [2001] 1 MLJ 259; [2001] 1 AMR 577; [2000] 1 MLRA 800, the Federal Court provided guidance on the application of these curative provisions as follows:

> As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction.

[39] In the present case, the misdirection committed by the trial judge were so serious that they resulted in a substantial miscarriage of justice. Unlike in *Tunde Apatira* (*supra*) where the Federal Court upheld the conviction on the basis that the evidence was entirely overwhelming and that a properly directed tribunal would have inevitably reached the same conclusion, the evidence against the appellant in this case did not overwhelmingly establish guilt beyond reasonable doubt.

[40] On the contrary, as will be further elaborated, the prosecution's case suffered from significant deficiencies in proving the essential elements of abetment. Therefore, the exceptional circumstances that would justify upholding a conviction despite legal misdirection, as outlined in *Tunde Apatira* (*supra*) are not present in the present appeal. Respectfully, I find the cumulative effect of the trial judge's errors renders the conviction unsafe and unsustainable in law.

Failure To Prove The Ingredients Of Abetment

[41] The prosecution's case against the appellant for abetment under s. 109 read with s. 409 of the Penal Code suffered from significant deficiencies. These deficiencies were particularly evident in the prosecution's failure to establish the essential elements of abetment as defined under s. 107 of the Penal Code.

[42] The necessary elements to constitute abetment as defined under s. 107 of the Penal Code are well established. Traditionally, the three elements are instigation, conspiracy and intentionally aiding.

[43] In *PP v. Datuk Hj Harun Hj Idris & Ors* [1977] CLJU 92; [1977] 1 LNS 92; [1977] 1 MLJ 180; [1977] 1 MLRH 438, His Lordship the Honourable Abdoolcader J elucidated on the necessary elements of the offence of abetment under s. 107 of the Penal Code in the following observations:

> In connection with the charge of abetment by the first and third accused of criminal breach of trust by the second accused, I find that the acts of the first accused in respect of abetment fall within all three limbs of s. 107 of the Penal Code, namely, abetment by instigation, conspiracy and intentionally aiding. With regard to the third accused, his acts come under abetment by conspiracy and intentionally aiding.
>
> Instigation consists of acts which amount to active suggestion or support or stimulation for the commission of the main act or offence. Advice can also become instigation if that advice is meant to actively suggest or stimulate the commission of an offence (*Ragunath Das v. Emperor* [1920] 21 Cr LJ 213). Abetment by conspiracy consists in the combination and agreement of persons to do some illegal act or to effect some illegal purpose by illegal means. Proof of conspiracy need not be direct proof but can be a matter of inference deduced from certain criminal acts of the accused done in pursuance of an apparent criminal purpose in common between them (*Emperor v. Abdul Hamid* [1945] 46 Cr LR 342). Abetment by aiding takes place when a person by the commission of an act intends to facilitate and does in fact facilitate the commission of an offence *Faguna Kanta Nath v. State of Assam* AIR [1959] SC 673. Where there is shown a positive act of assistance voluntarily done by a person with a knowledge of the circumstances constituting the offence, the abettor is guilty of abetment by aiding (*National Coal Board v. Gamble* [1959] 1 QB 11.

[44] In June 2012, s. 107 of the Penal Code was amended to include the element of "command" under the new para. (aa). In my considered view, the concept of abetment through the act of commanding another individual to commit the principal offence was established to address circumstances in which persons, particularly those in positions of authority or leadership, instigate, direct, or order others to engage in criminal conduct. This provision is intended to ensure accountability for individuals who orchestrate or facilitate criminal activities through subordinates, thereby preventing masterminds or leaders of criminal organisations from evading legal responsibility solely on the basis that they did not personally execute the unlawful acts but instead exercised their authority to compel others to do so.

Abetment By Instigation

[45] In the present appeal, the evidence of PW26 directly contradicted the prosecution's claim that the appellant instigated Muhammad Sufi to commit criminal breach of trust. PW26 testified unequivocally that the appellant

never issued direct instructions concerning payment applications or project implementation. PW26 further stated that the implementation of the project was overseen by Muhammad Sufi through the transformation unit with minimal involvement from the appellant. This testimony did not support the prosecution's theory of instigation and cast serious doubt on the appellant's alleged role in prompting or encouraging the commission of the offence.

Abetment By Command

[46] To establish abetment by command under s. 107(aa) of the Penal Code, the prosecution was required to prove that the accused held a position of authority and used that authority to direct or instruct the principal offender to commit the offence.

[47] In the present case, although the appellant occupied a superior hierarchical position to Muhammad Sufi within FELDA's organisational structure, the prosecution failed to prove that the appellant commanded Muhammad Sufi to commit criminal breach of trust. The testimony of PW26 was particularly significant in this regard. PW26 confirmed under cross-examination that the appellant never issued direct instructions to Muhammad Sufi concerning the specific payments or transactions that formed the basis of the criminal breach of trust charges. Instead, PW26 testified that project implementation was largely handled autonomously by Muhammad Sufi through the transformation unit. This testimony directly negated any supposition that the appellant exercised authoritative control over the commission of the alleged offence.

[48] Furthermore, the evidence demonstrated that the payments in question were processed through FELDA's established financial procedures involving multiple levels of approval and oversight procedures. There was no evidence to demonstrate any possibility that the payments resulted from direct commands issued by the appellant to Muhammad Sufi.

Abetment By Conspiracy

[49] To establish abetment by conspiracy under s. 107(b) of the Penal Code, the prosecution bore the burden of proving an agreement or common intention between the appellant and Muhammad Sufi to commit criminal breach of trust. In *Datuk Hj Harun bin Hj Idris* (*supra*), the court held that conspiracy requires proof of a combination and agreement between two or more individuals to engage in an illegal act or to achieve an illegal purpose through unlawful means.

[50] In the present appeal, the prosecution failed to adduce any direct evidence of an agreement or common intention between the appellant and Muhammad Sufi to misappropriate FELDA's funds. No witness testified to the existence of any conversation, communication or meeting where such an agreement was reached. The mere fact that both the appellant and Muhammad Sufi were directors of the relevant companies did not, in itself,

establish a conspiracy. The prosecution's reliance on their positions as directors was speculative and did not satisfy the legal threshold required to prove abetment by conspiracy beyond reasonable doubt.

Abetment By Intentional Aid

[51] To establish abetment by intentional aid under s. 107(c) of the Penal Code, the prosecution was required to prove that the appellant knowingly and deliberately assisted Muhammad Sufi in committing criminal breach of trust. In *Faguna Kanta Nath v. State of Assam* AIR 1959 SC 673; [1959] SC 673, the court held that mere presence or awareness of an offence is insufficient to establish abetment by intentional aid. The accused must have actively participated in facilitating the commission of the offence.

[52] The prosecution's case primarily relied on the appellant's signing of the TTSA and DBCA agreements. However, the evidence demonstrated that these agreements were reviewed and vetted by FELDA's legal department, as confirmed by PW48, and by the external legal counsel, PW46 and PW47. PW48 testified that the agreements were subjected to proper legal scrutiny before execution. This evidence indicates that the appellant signed the agreements in reliance on professional legal advice rather than with any intention to aid Muhammad Sufi in committing criminal breach of trust. The prosecution failed to disprove this reasonable explanation.

[53] Furthermore, the prosecution failed to prove that the appellant was aware of any intention on Muhammad Sufi's part to commit criminal breach of trust and that he deliberately assisted in its commission. In *Loh Liang Gun* (*supra*), the Court of Appeal emphasised that for abetment by intentional aid, the prosecution must establish that the accused had knowledge of the principal offender's intent to commit the offence and took deliberate actions to facilitate it.

[54] In the present appeal, the evidence suggested that the appellant acted within his authority and in good faith to implement board-approved projects. PW26 testified that the appellant consistently sought legal advice and adhered to established procedures concerning the Sturgeon Project. This testimony contradicted the prosecution's assertion that the appellant knowingly and intentionally aided Muhammad Sufi in committing criminal breach of trust. The evidence, instead, indicated that the appellant acted in accordance with his official duties and in reliance on legal and procedural guidance.

[55] Additionally, for abetment under s. 107 of the Penal Code to be established, the prosecution was required to prove that the principal offence was committed as a direct consequence of the alleged abetment. In the present case, the evidence did not demonstrate a causal link between the appellant's actions and Muhammad Sufi's alleged commission of criminal breach of trust. The payments in question were processed through established

approval procedures within FELDA, involving multiple levels of oversight procedures. This evidence suggested that the payments were part of routine business operations and were not the result of any abetment by the appellant.

[56] In light of these significant evidentiary deficiencies, I found the prosecution failed to establish beyond reasonable doubt that the appellant had committed abetment under s. 109 read with s. 409 of the Penal Code. The trial judge's failure to properly analyse and consider these essential elements of abetment constituted a serious misdirection in law.

Failure To Consider The Defence Evidence

[57] A further fundamental flaw in the trial judge's approach was his failure to properly assess and consider the defence evidence. In my considered view, the evidence presented by the defence raised reasonable doubt as to the appellant's guilt. However, the trial judge appeared to summarily dismiss much of the defence's case as a bare denial without engaging in a proper analysis. This constituted a serious misdirection in law.

[58] The appellant's primary defence was that he acted in good faith and within the scope of his authority as the Director-General of FELDA. He asserted that his actions were in furtherance of the Sturgeon Project which had been approved in principle by the FELDA Board. He contended that the board's approval, as recorded in minutes no. 304 (special) dated 4 July 2013, authorised him to proceed with the project. Based on this approval, he argued that he was empowered to enter into the necessary agreements and facilitate the required payments.

[59] Several defence witnesses, including DW6, a former Director-General of FELDA who had attended the relevant Board meeting, testified that comprehensive presentations were made regarding the Sturgeon Project. These witnesses further testified that the Board had granted its approval for the project. This testimony directly contradicted the prosecution's assertion that the project had not received proper Board approval.

[60] Despite the significance of this testimony, the learned trial judge dismissed it without conducting a proper evaluation. The failure to assess the credibility and weight of independent witness testimony is a serious legal error. In *Dato' Yap Peng* (*supra*), the Federal Court held that evidence provided by independent witnesses who have no personal interest in the case must be carefully examined and given due consideration. The trial judge's failure to properly assess the testimony of DW6 and other defence witnesses amounted to a serious misdirection that materially prejudiced the appellant's case.

[61] Additionally, the appellant adduced evidence demonstrating that the FELDA board was regularly updated on the progress of the Sturgeon Project during subsequent board meetings. Importantly, no objections were raised by the board in these meetings. This fact was corroborated by PW41 who confirmed that the board had been kept informed. This evidence supported

the appellant's contention that the board was aware of, and by reasonable deduction, implicitly approved the continued implementation of the sturgeon project.

[62] Furthermore, the appellant presented evidence that the sturgeon project was undertaken in good faith as a strategic initiative to generate alternative revenue streams for FELDA. This need for alternative income arose after the listing of FGV which had significantly diminished FELDA's financial resources. PW41 confirmed that FELDA encountered substantial financial difficulties following the listing of FGV. This testimony supported the appellant's rationale for pursuing the Sturgeon Project as a means of financial sustainability for FELDA.

[63] In *Periasamy Sinnappan v. PP* [1996] 3 CLJ 187; [1996] 1 MLRA 277; [1996] 2 MLJ 557; [1996] 2 AMR 2511 (*refd*), the Court of Appeal held that a person who acts under an honest belief, even if such belief is ultimately mistaken, cannot be found guilty of criminal breach of trust. The evidence presented by the appellant, if properly considered, suggested that he honestly believed he was acting within his lawful authority and in the best interests of FELDA. This belief, if accepted, would negate the element of dishonest intention required to establish the principal offence of criminal breach of trust.

[64] The learned trial judge's failure to adequately consider this defence evidence and to determine whether it raised a reasonable doubt as to the appellant's guilt constituted a serious misdirection.

Failure To Produce Crucial Minutes Of Board Meeting And Audio Recordings

[65] A fundamental weakness in the prosecution's case was its failure to produce critical evidence relating to FELDA Board meetings. This failure was particularly significant concerning the audio recordings of Board Meeting No. 304 (Special) held on 4 July 2013, a meeting central to the case. PW27, who served as the board secretary, testified under cross-examination that audio recordings of this meeting had been made. This testimony confirmed the existence of recorded evidence that could have clarified the true discussions and decisions made by the Board.

[66] However, when pressed to produce these recordings, PW27 stated that they had been deleted for "security reasons". This explanation lacked credibility given the fundamental importance of Board meeting records in corporate governance. The maintenance of accurate and complete records is especially crucial for an organisation of FELDA's significance. The unexplained deletion of such key evidence raised serious doubts about the integrity of the prosecution's case.

[67] In *Dato' Yap Peng* (*supra*), the Federal Court held that where a tape recording of a meeting exists and the prosecution asserts that the minutes accurately reflect its contents but fails to produce the recording, an adverse

A inference should be drawn under s. 114(g) of the Evidence Act 1950. The court emphasised that the failure to produce primary evidence, particularly when its existence is established, undermines the prosecution's case and supports the defence's version of events.

B **[68]** This principle was particularly applicable in the present case due to the existence of two conflicting sets of minutes for Board Meeting No. 304 (Special). The prosecution relied on document marked as exh. P100 as the official record of the meeting. In contrast, the defence presented document marked as exh. D372 which was the original draft minutes prepared by PW27. A comparison of these two documents revealed significant C discrepancies, particularly regarding the conditions attached to the approval of the Sturgeon Project.

[69] PW42 admitted to making alterations to the minutes without clear authorisation. Meanwhile, PW27's explanation for these alterations was vague and inconsistent. Their testimony established that the original draft D minutes (exh. D372) materially differed from the final version (exh. P100). The most crucial differences concerned the conditions imposed by the Board when approving the sturgeon project. These discrepancies raised substantial doubt as to the accuracy and reliability of the prosecution's version of events.

E **[70]** The prosecution's failure to produce the audio recordings, which would have definitively clarified the discussions and decisions made during the Board meeting, constituted a severe evidentiary gap. Applying the principle established in *Dato' Yap Peng* (*supra*), an adverse inference should be drawn against the prosecution. The absence of the recordings supported the appellant's contention that the Board had, in fact, granted approval for F the sturgeon project. The deleted recordings could have confirmed whether the Board had imposed conditions on the project or granted it unqualified approval.

[71] Where crucial evidence exists that could definitively establish the G prosecution's case but is not produced, the accused must be given the benefit of the doubt. (See: *PP v. Mohd Azam Basiron & Anor* [2010] 9 CLJ 1; [2011] 3 MLJ 741; [2010] 2 MLRA 487 (*foll*)). This principle applies squarely to the present appeal. The prosecution's inability to produce the audio recording of the Board meeting deprived the court of key evidence that could have settled the conflicting versions presented at trial. As such, the benefit H of the doubt must be given to the appellant.

[72] The prosecution's reliance on altered minutes further weakened the reliability of its case. PW42 admitted to making unauthorised alterations to the minutes. PW27 failed to provide a coherent explanation for these changes. These factors raised serious concerns about the credibility of the I documentary evidence that formed the foundation of the prosecution's case. The inconsistencies in the minutes of the meeting coupled with the unexplained deletion of the audio recordings created a significant evidentiary gap that severely weakened the prosecution's argument.

Corporate Governance And Authority

[73] The prosecution's case was fundamentally flawed due to its misunderstanding of FELDA's corporate structure and governance framework. The evidence provided by PW4 clearly established that the highest authority within FELDA rested with its Board of Directors. Decision-making power over FELDA's assets and financial commitments was vested in the Board, not in any individual officer, including the appellant or Muhammad Sufi. This critical distinction was overlooked by the prosecution.

[74] In *PP v. Hj Hussin Hj Mohd Rejab* [1994] 3 CLJ 93; [1992] MLJU 3; [1992] 4 MLRH 192; [2021] MLRHU 389, the High Court observed:

> Unless the contrary is shown the proper authority having control of the Company's assets, including cash, is the Board of Directors and not any one Director in his individual capacity.

[75] The testimony of PW44 further reinforced this principle. PW44 confirmed that any investment exceeding RM100 million required express Board approval. Investments below this threshold fell within the purview of the investment committee, which was subsequently replaced by FIC. However, despite this delegation of authority, the investment committee and FIC remained subject to Board oversight and were accountable for their financial decisions. This governance structure directly contradicted the prosecution's theory that individual officers, such as the appellant and Muhammad Sufi, had the unilateral authority to commit FELDA to substantial financial obligations without Board approval.

[76] The evidence further demonstrated that the payments in question were processed in accordance with FELDA's established financial procedures. These payments underwent multiple levels of scrutiny, approval and oversight procedures. PW44 explicitly confirmed that the payments followed the requisite internal procedures and were duly reported to the Board. This evidence indicated that the payments were part of FELDA's routine business operations rather than an orchestrated scheme to misappropriate funds. The prosecution failed to establish any deviation from the established financial protocols.

[77] Additionally, subsequent Board meeting minutes, marked as document exh. P352, showed that when updates on the Sturgeon Project were presented, no objections were raised by the Board. This was corroborated by the testimony of PW41, PW44 and other prosecution witnesses, all of whom confirmed that the Board had been kept informed of the project's progress. This documentary evidence directly undermined the prosecution's assertion that the Sturgeon Project lacked proper Board approval or oversight. The failure of the prosecution to reconcile this contradiction further weakened its case against the appellant.

[78] The evidence in the present appeal demonstrated that losses associated with the Sturgeon Project only materialised after its premature termination by FELDA's new management. By that time, the appellant had already left FELDA. This strongly suggested that the losses arose due to subsequent business decisions rather than any alleged criminal misconduct by the appellant or Muhammad Sufi. The prosecution failed to establish any direct causal link between the appellant's actions and the financial losses incurred. Financial losses resulting from business decisions, without evidence of dishonest intent, do not constitute criminal liability. (See: *Chang Lee Swee v. PP* [1984] CLJU 134; [1984] 1 LNS 134; [1985] 1 MLJ 75).

[79] In light of these findings, the prosecution's failure to correctly interpret FELDA's corporate governance structure, its inability to establish unauthorised financial commitments and its reliance on speculative assertions regarding financial losses rendered its case untenable.

Dishonest Intention

[80] A fundamental element of the principal offence of criminal breach of trust is the presence of dishonest intention. It is well established that the mens rea requirement under s. 24 of the Penal Code, as encapsulated in the term "dishonestly", necessitates proof of an intention to cause either wrongful gain or wrongful loss. The prosecution bore the burden of proving beyond reasonable doubt that the appellant acted with such intent as distinguished from proof of actual wrongful loss or gain. (See: *Aisyah Mohd Rose & Anor v. PP* [2016] 1 CLJ 529; [2016] 1 MLRA203; [2016] 1 MLJ 840; [2016] 1 AMR 521; [2015] AMEJ 1724).

[81] However, the prosecution failed to discharge this burden. The evidence did not establish that the appellant acted with dishonest intent. Instead, the evidence indicated that the appellant's actions were directed toward securing FELDA's financial stability following the listing of FGV. This corporate restructuring had significantly diminished FELDA's revenue streams necessitating alternative investment strategies to sustain its operations. PW41 confirmed that FELDA faced financial difficulties post-listing. This testimony directly supported the appellant's explanation that the sturgeon project was pursued as a means of generating alternative revenue for FELDA.

[82] The testimony of PW26 further reinforced this position. PW26 stated that feasibility studies conducted prior to the project's approval projected that the sturgeon project would be profitable. Additionally, PW41 conceded under cross-examination that the project was a good project. This acknowledgment from the prosecution's own witnesses contradicted the assertion that the appellant had pursued the project dishonestly or with the intent to cause wrongful loss to FELDA. The losses associated with the sturgeon project only materialised after FELDA's new management made

the decision to prematurely terminate the project. At that time, the appellant had already left FELDA, further severing any causal link between his actions and the financial losses incurred.

[83] The principle established in *Periasamy* (*supra*) is directly applicable to the present case. In that case, the Court of Appeal held that a person acting under an honest belief, even if that belief was ultimately mistaken, cannot be guilty of criminal breach of trust. The evidence adduced at trial strongly suggested that the appellant acted under the genuine belief that he was operating within the scope of his authority and in furtherance of FELDA's best interests. This belief, whether correct or not, negated the element of dishonest intention required to establish the principal offence of criminal breach of trust.

[84] In light of this evidence, I hold the considered view that the prosecution has failed to establish beyond reasonable doubt that the appellant had acted dishonestly. The learned trial judge's failure to properly analyse and consider this crucial element of the offence constituted a serious misdirection in law.

Defects In The Charges

[85] The charges framed against the appellant did not specify the precise manner in which the alleged abetment under s. 107 of the Penal Code was committed. (See: *Datuk Tiah Thee Kian v. PP & Other Appeals* [2002] 2 CLJ 21; [2002] 1 MLJ 585; [2001] 4 MLRH 453 (*refd)*; [2001] AMEJ 0055). While the law does not impose an absolute requirement to specify the exact mode of abetment in the charge, the omission became critical in the context of the present appeal. The learned trial judge failed to make clear and definitive findings on which mode of abetment, whether by instigation, command, conspiracy or intentional aid, was proven by the evidence. This failure created ambiguity and prejudiced the appellant's ability to effectively prepare his defence.

[86] Additionally, a fundamental inconsistency existed between the principal charge against Muhammad Sufi and the abetment charges against the appellant. The charge against Muhammad Sufi specifically referenced the misappropriation of FELDA Caviartive's funds, whereas the abetment charges against the appellant referred to FELDA's funds. This distinction was not minor, as FELDA and FELDA Caviartive were legally distinct entities with separate financial structures. This inconsistency had the potential to mislead the appellant in preparing his defence, as he was not clearly informed of the precise financial transactions that formed the basis of the allegations against him.

[87] The legal principles articulated in *Ravindran Ramasamy v. PP* [2015] 3 CLJ 421; [2015] 6 MLJ 509; [2015] 3 MLRA 112 (*refd*) are directly applicable to the present appeal. In that case, the Federal Court held that ss. 156 and 422 of the Criminal Procedure Code cannot be invoked to cure

a defective charge if the accused was misled to the extent that a failure of justice occurred. The defects in the charges against the appellant, when considered alongside the learned trial judge's misdirections, resulted in procedural unfairness. These deficiencies cumulatively led to a failure of justice that could not be remedied by the application of curative provisions under the Criminal Procedure Code.

[88] Given these material defects in the charges, coupled with the learned trial judge's failure to properly address the inconsistencies, the appellant was deprived of a fair trial. The errors were not mere irregularities but went to the root of the charge proffered against the appellant.

Application Of Tunde Apatira & Ors v. PP

[89] In *Tunde Apatira* (*supra*), the Federal Court laid down the general principle regarding appellate intervention in cases involving judicial misdirection. The apex court remarked as follows:

> As a general rule this court will, in the normal course of events, quash a conviction where there has been a misdirection. Exceptionally, a conviction will be upheld despite a misdirection where this court is satisfied that a reasonable tribunal would have convicted the accused on the available evidence on a proper direction.

[90] The Federal Court in *Tunde Apatira* (*supra*) upheld the convictions despite the misdirection because the evidence against the appellants was entirely overwhelming. His Lordship, the Honourable Gopal Sri Ram JCA (later FCJ), said:

> Having scrutinised the record with care, we are satisfied that this is an appropriate case forthe application of the proviso. The evidence, both direct and circumstantial, against the appellants is entirely overwhelming. A court applying s. 37(da) in the manner required by Muhammed bin Hassan would have nevertheless convicted the appellants on the available evidence.

[91] The present appeal, however, is fundamentally distinguishable from *Tunde Apatira* (*supra*) for several reasons. First, in *Tunde Apatira* (*supra*), the misdirection pertained to a specific point of law concerning the interpretation of a statutory provision. In contrast, in the present appeal the misdirection by the trial judge were far more serious. They went to the very core of the learned trial judge's understanding of the nature of the charges against the appellant. The learned trial judge conflated the elements of the principal offence under s. 409 of the Penal Code with those of abetment under s. 109, thereby fundamentally misconceiving the legal framework applicable to the appellant's case.

[92] Second, in *Tunde Apatira* (*supra*), the Federal Court upheld the convictions because the evidence against the appellants was entirely overwhelming. The court was satisfied that a properly directed tribunal would have inevitably reached the same conclusion. By contrast, in the

present appeal the prosecution's evidence did not establish the appellant's guilt beyond reasonable doubt. As previously discussed, the prosecution's case suffered from substantial deficiencies in proving the essential elements of abetment under s. 107 of the Penal Code. The evidence did not demonstrate that the appellant had instigated, conspired, commanded or intentionally aided the commission of the principal offence. The misdirection by the learned trial judge in assessing these elements were not minor or technical errors but went to the very foundation of the conviction.

[93] Third, in *Tunde Apatira* (*supra*), the Federal Court was satisfied that the totality of the evidence reasonably supports the conclusion that the offence was committed even in the absence of the incorrect legal presumption applied by the trial judge. In the present appeal, the totality of the evidence does not support the conclusion that the appellant committed abetment under s. 109 of the Penal Code. The prosecution failed to establish any of the modes of abetment defined in s. 107. Furthermore, there was substantial evidence supporting the appellant's defence that he acted in good faith and within the scope of his authority.

[94] Therefore, the exceptional circumstances that justified upholding a conviction despite a misdirection in *Tunde Apatira* (*supra*) are not present in this case. The general principle stated in *Tunde Apatira* (*supra*) that a conviction should be quashed where there has been a misdirection, must be applied. This principle was reaffirmed in *Alcontara* (*supra*), where the Federal Court held that a conviction must be set aside when misdirection fundamentally affect the fairness of the trial. Given the nature and extent of the misdirection in the present case, the appellant's conviction cannot stand and ought to be quashed to rectify the miscarriage of justice.

Conclusion

[95] For the reasons set out above, I find that the prosecution failed to establish its case beyond reasonable doubt. The prosecution was unable to prove the essential elements of abetment as required under s. 107 of the Penal Code. This failure, when considered alongside the learned trial judge's multiple misdirections and the significant evidentiary deficiencies, rendered the conviction fundamentally unsafe and unsustainable in law.

[96] Given these circumstances, the appeal against both conviction and sentence are allowed. The conviction and sentence imposed by the trial court are hereby set aside. The appellant is accordingly acquitted and discharged of both charges.